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No. 2400

In the United States Circuit  
Court of Appeals

Ninth Circuit

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OREGON & CALIFORNIA RAILROAD

COMPANY, A Corporation, *et al.*,

Defendants and Appellants

JOHN L. SNYDER, *et al.*,

Cross-Complainants and Appellants

WILLIAM F. SLAUGHTER, *et al.*,

Interveners and Appellants

*vs.*

THE UNITED STATES OF AMERICA,

Complainant and Appellee

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Brief for Interveners

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LEWIS C. GARRIGUS,

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A. C. WOODCOCK,

Of Counsel.

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STATEMENT OF FACTS.

The Congress of the United States, by an Act bearing date July 25, 1866, made a grant of land in the

State of Oregon in aid of the construction of a railroad to run from Portland, Oregon, to the Oregon and California boundary at a point to intersect or connect with a road to be constructed from a point on the Central Pacific Railroad and running northwardly to the California and Oregon boundary. By Section 12 of the Act creating this grant the Congress reserved the right to "Amend, alter or repeal" said act.

By an Act bearing date the 10th day of April, 1869—no Company having qualified under the terms of the Act of July 25, 1866, to claim the rights granted thereby, and no right having been acquired by any person, nor by any corporation, the Congress amended the said Act of July 25, 1866, by providing amongst other things that: "*And provided further* that the lands granted by the act aforesaid shall be sold to actual settlers only, in quantities not greater than one-quarter section to one purchaser and for a price not exceeding \$2.50 per acre."

Thereafter, to-wit: On June 8, 1869, the Oregon and California Railroad company, having in the meantime acquired all rights of the Oregon Central Railroad Company, a corporation, which had attempted to qualify to accept and acquire the advantages under said Act of July 25, 1866, duly accepted the terms of said Act as amended by the Act of April 10, 1869, such assent and acception being in the words and figures following:

"Resolved, That this company, the Oregon & California Railroad Company of Salem, Oregon, \* \* \* do hereby accept all the provisions, rights, privileges



and franchises of said Act of July 25, A. D. 1866, entitled an Act granting lands to aid in the construction of a railroad and telegraph line from \* \* \* and all acts amendatory thereof, and upon the conditions therein specified, and do hereby give our assent, and the assent of such company thereto." That this acceptance and assent was filed in the office of the Secretary of the Interior of the United States as required by said Act, the same being a condition precedent to the acquiring of any rights thereunder. That under the rights acquired by said O. & C. Railroad Company by its assent to the terms and conditions of said Act of July, 25, 1866, and the amendments thereto, said Company built the railroad and telegraph line contemplated, has maintained and operated the same, has transported and carried the United States mails, munitions of war, etc., etc., and has done everything required of it by the terms of said Act of July 25, 1866, and the Acts amendatory thereof—*Except* that it has sold lands in larger quantities than one quarter section or 160 acres to one person, and at prices in excess of \$2.50 per acre, and *has refused* to sell lands to persons who have applied to purchase the same under the terms of the grant, to-wit: to these interveners, who each became an actual settler upon a quarter section of said granted lands, made application to purchase the same, tendered the maximum price of \$2.50 an acre therefor and demanded a deed, which application, tender and demand were in the case of each intervener, rejected, denied and refused.

These conditions existed when on September,

1908, the United States of America filed a suit in equity in the Circuit Court of the United States for the District of Oregon, in which suit it demanded a forfeiture of the unsold portions of said grant, or a decree to enforce specific performance of the terms of the grant *upon the grounds of the alleged sales in violation of the terms of the grant, and refusal to sell in compliance with the terms of the grant.*

By proper orders these interveners were made parties to said suit and were permitted to be heard therein as to their alleged rights based upon their several applications, tenders and demands. By its order and decree entered July 1, 1913, the District Court of the United States for the District of Oregon, having jurisdiction of said cause, dismissed the petitions of these interveners upon the ground that they had no equitable interest in the subject matter of said suit.

This statement of facts relates to what is known as the East Side grant, but the same facts apply to the West Side grant made by Act of Congress of May 4, 1870, with the exception that the provision as to the sale of the lands was embraced in the original Act and not in an amendment. All other facts are the same as to both grants, and both are embraced in the suit in question, and the orders and decree entered and rendered therein.

In view of the contention of the Complainant-Appellee that it should have a forfeiture of the unsold portions of the granted lands, another fact is important. The record shows that in a number of instances patents



were issued to purchasers from the railroad company of large bodies of the granted lands, which had been sold in violation of the terms of the grant.

Considering these facts the interveners insist upon the following

## PROPOSITIONS

### I.

The intention of Congress in providing the manner in which the lands should be sold was to create a trust in the granted lands for the benefit of those who might desire to acquire title thereto and to make the company, which should qualify under the law to take the rights and privileges granted, the trustee to administer the trust.

### II.

The Complainant-Appellee, having created a trust in the granted lands, having accepted the benefits accruing to itself from the building and operation of the road under and by virtue of the grant, and having invited applications to purchase the lands under the terms of the trust, should not be heard to claim a forfeiture of any portion of the trust estate, but should be required to assist in enforcing the terms of the trust.

### III.

By its acquiescence in sales made by the trustee in violation of the terms of the trust, issuing patents for

lands sold in violation of the terms of the trust, and by encouraging these interveners to qualify as purchasers under the terms of the trust, the Complainant-Appellee is in good conscience and equity estopped from asserting any demand for forfeiture, and must be held to its duty of compelling specific performance for the benefit of those who have qualified as purchasers, and who have acquired an equitable interest in the subject of the trust.

#### IV.

The Appellant, Defendant, O. & C. R. R. Co., having accepted all the terms of the grants, and having under such acceptance received all the rights, privileges and benefits of the grants with the conditions and limitations attached thereto should not be heard to claim any greater rights in the trust estate accepted by it than is given by the plain letter of the law creating the grant, to-wit: the sum of two dollars and fifty cents per acre for each acre of the granted lands which it could or might sell for that price. It should be held strictly to the terms of the trust which it accepted.

#### ASSIGNMENT OF ERRORS

The errors assigned by these interveners are so numerous and so voluminous that it is impracticable to embrace them all in a brief. They cover ninety-six pages of the printed transcript of record and are found at page 8471 in volume sixteen, extending to page 8567

in said volume, being numbered consecutively from 1 to 359. Many of these, however, are repetitions, being repeated for each set of interveners. Only the general assignments, and some of those relating to one set of interveners, will be cited.

By the stipulation entered into by all the parties to this cause, through their respective attorneys, which stipulation is found at page 8652 of the printed transcript of record, it is agreed that the bill in intervention of B. W. Nunnally, et al., shall be printed in the record, and that all other bills in intervention are, in substance and effect, the same.

The assignments of error relating to this bill are found on page 8497 of the printed transcript and are numbered from 111 to 120, ending on page 8499 of the transcript. They are as follows:

### 111

The Court erred in sustaining the demurrer of the defendants, Oregon & California Railroad Company, Southern Pacific Company and Stephen T. Gage, individually and as Trustee, to the bill of intervention of the intervener, B. W. Nunnally, and the other interveners with him in his said bill joined, for want of equity in said bill, and

### 112

The Court erred in sustaining the demurrer of the defendant, Union Trust Company, individually and as

Trustee, to the bill of intervention of said interveners, for want of equity in said bill, and

## 113

The Court erred in sustaining the motion of the defendants, Oregon & California Railroad Company, Southern Pacific Company and Stephen T. Gage, individually and as Trustee, to strike the bill of intervention of said interveners, for want of equity in said bill, and

## 114

The Court erred in sustaining the motion of the defendant, Union Trust Company, individually and as Trustee, to strike the bill of intervention of said interveners, for want of equity in said bill, and

## 115

The Court erred in sustaining the motion of the complainant for an order striking the bill of intervention of said interveners, and in granting and entering the order striking said bill, for want of equity in said bill, and

## 116

The Court erred in not requiring the Oregon & California Railroad Company, Southern Pacific Company and Stephen T. Gage, individually and as Trustee, to answer said bill in intervention, and

## 117

The Court erred in not requiring the Union Trust



Company, individually and as Trustee, to answer said bill in intervention, and

The Court erred in not requiring the complainant to answer said bill in intervention, and

The Court erred in not granting to said interveners and each of them, the relief prayed for by them and each of them, respectively, in said bill, and

The Court erred in not granting to said interveners or any of them, any equitable relief,

As said bill of intervention contains allegations and matters entitling said interveners and each of them to equitable relief, and

Said bill of intervention contains allegations and matters entitling the said interveners and each of them, to the relief prayed for by them and each of them, respectively, in said bill.

The general assignments of error to which the attention of the Court is called begin with No. 281 at page 8539 of the record, and run through to No. 359 on page 8567. They are as follows:

The Court, being a court of equity, erred in decreeing a forfeiture to the complainant of all right and



interest of the defendants in or to the lands embraced within the grant of 1866, for breach of the assumed condition contained in the amendment of April 10, 1869, as

(a) Assuming that said proviso was a condition subsequent, for breach of which forfeiture could be had, such condition subsequent was and is also a covenant; and

(b) The complainant prayed in its bill of complaint for a specific performance of this covenant, and

(c) Such forfeiture was and is inequitable and should not be decreed by any court of equity where there is any other means of doing justice between the parties; and

(d) The complainant prayed for specific performance of the covenant, and the Court should have granted such prayer, as by such performance justice and equity could have been done to all of the parties to the suit without forfeiture; and

(e) The Court was without jurisdiction to and it was inequitable for it to divest the defendant, Oregon and California Railroad Company of title as trustee for the benefit of the interveners and cross-complainants, *sestui que trustent*, with interests vested prior to said decree; and

(f) In divesting the railroad company of title by forfeiture, the Court, in effect, imposed a penalty upon the railroad company to the extent of its interest in the land forfeited, to-wit: in the amount of \$2.50 per acre for each acre of the land so forfeited, for and on ac-

count of the breach of its covenant, the imposing of which penalty is wholly inequitable, and

(g) By forfeiture the Court divested the vested interest of these interveners and cross-complainants and each of them, without any fault on their part or on the part of any of them, all of which is wholly inequitable.

## 282

The Court, being a court of equity, erred in decreeing a forfeiture to the Complainant, of all right and interest of the defendants, in or to the lands embraced within the West Side land grant, for breach of the assumed condition contained in the act of May 4, 1870, as

(a) Assuming that said provision was a condition subsequent, for breach of which forfeiture could be had, such condition subsequent was and is also a covenant; and

(b) The complainant prayed in its bill of complaint for a specific performance of this covenant, and

(c) Such forfeiture was and is inequitable and should not be decreed by any court of equity where there is any other means of doing justice between the parties; and

(d) The complainant prayed for specific performance of the covenant, and the Court should have granted such prayer, as by such performance justice and equity could have been done to all of the parties to the suit without forfeiture; and

(e) The Court was without jurisdiction to and it was inequitable for it to divest defendant, Oregon and

California Railroad Company of title as trustee for the benefit of the interveners and cross-complainants, sicuti qui trustent, with interests vested prior to said decree; and

(f) In divesting the railroad company of title by forfeiture, the Court, in effect, imposed a penalty upon the railroad company to the extent of its interest in the land forfeited, to-wit: in the amount of \$2.50 per acre for each acre of the land forfeited, for and on account of the breach of its covenant, the imposing of which penalty is wholly inequitable, and

(g) By forfeiture the Court divested the vested interest of these interveners and cross-complainants and each of them, without any fault on their part or on the part of any of them, all of which is wholly inequitable.

## 283

The Court erred in not holding that this suit cannot be maintained by complainant as one to enforce forfeiture nor to quiet title, as

(a) Neither the United States nor Congress has declared a forfeiture; and

(b) The fact of forfeiture had not been adjudicated by a court of law; and

(c) The defendant, railroad company, holds legal title to and the possession of said granted lands; and

(d) Complainant having asked for forfeiture and in the alternative, for specific performance, this suit cannot be maintained for forfeiture, since equitable relief may be granted by specific performance; and

(e) In view of specific performance, a decree quieting title in the Government, cannot be had.

The Court erred in not holding that the Government was estopped to claim forfeiture of the lands embraced within each and both of said land grants, as

(a) The Government in its bill of complaint bases its right to recover, upon the refusal of the railroad company to sell said lands to the interveners and cross-complainants and others similarly situated, and

(b) The Government in its bill of complaint prayed that these interveners and cross-complainants might be permitted to enforce their rights herein, and

(c) The Government having come into a court of equity is estopped to claim forfeiture when equitable relief by performance can be had; and

(d) The Government is estopped to claim forfeiture in lieu of performance, since the interveners and cross-complainants have come into court upon the invitation of the Government and furnished the means whereby performance may be had.

The Court erred in holding that the provisions in each and both of said land grants concerning sales to settlers, are negative provisions only, designed to prevent sales to others than settlers in quantities greater than one-quarter section to any one purchaser and at prices greater than \$2.50 per acre, and not positive pro-



visions requiring sales to settlers in quantities not greater than one-quarter section to any one purchaser and at a price not greater than \$2.50 per acre.

## 286

The Court erred in not holding that the provisions of each and both of said land grants concerning sales to settlers were both positive and negative, requiring the grantee to sell to settlers, who should apply to buy, not more than one-quarter section, at a price not greater than \$2.50 per acre, and requiring said grantee to refrain from selling any of the granted lands to others than settlers or in quantities greater than one-quarter section or at a price greater than \$2.50 per acre.

## 287

The Court erred in holding that the provisions in each and both of said land grants, requiring sales to settlers, are not positive covenants which may be specifically enforced.

## 288

The Court erred in holding that the provisions in each and both of said land grants requiring sales to settlers, is a negative covenant only, which may be enforced by the Government only, and that the only means of such enforcement are by forfeiture for breach thereof.

## 289

The Court erred in decreeing a forfeiture of those lands included in either or both of the grants to the



railroad company or which the interveners and cross-complainants had made application to purchase from and tendered to the railroad company the sum of \$2.50 per acre and offered to become actual settlers on the lands so applied for, prior to the adoption by Congress of the joint resolution of April 30, 1908, as

By so applying, tendering the purchase price and offering to become an actual settler upon the lands so applied for, each intervener and cross-complainant has acquired a vested interest in the land applied for, which cannot be divested by Congress, assuming that said provisions are conditions subsequent, and that the adoption of said joint resolution by Congress was a declaration of forfeiture for breach thereof.

The Court erred in holding that although the provisions in each and both of said land grants were designed to devote the lands conveyed by said grants, to settlement and tillage and to prevent the monopoly of the land and that such grants were laws as well as grants, that notwithstanding the railroad company might defeat the purposes of the provisions requiring sales to settlers, by themselves monopolizing and holding the lands and refusing to sell them at all, and by refusing to sell any of them except to such persons and in such quantities as it saw fit within the price and terms provided in the grant.

The Court erred in not holding that the purpose of the joint resolution of Congress of April 30, 1908, was to authorize the enforcement of a forfeiture for any breach of an assumed condition subsequent in either of said land grants, as an alternative only, of the refusal of the railroad company to perform the covenants requiring sales to settlers, after such performance had been decreed by the Court.

The Court erred in not holding that the joint resolution of Congress of April 30, 1908, authorized the enforcement of forfeiture for any breach of an assumed condition subsequent in either of said land grants, only in the event that specific performance of the covenants in said grants, requiring sales to settlers, could not be enforced.

The Court erred in not holding that the joint resolution of Congress of April 30, 1908, authorized a forfeiture of the legal title of the railroad company for breach of an assumed condition subsequent in either of said land grants, only as a means of carrying into effect the covenants in said grants requiring sales to settlers.

The Court erred in holding that at the time of the filing of the bill of complaint herein and ever since,

and for a long time continuously next prior thereto, the Oregon and California Railroad Company, did not have possession of said grants or either of them.

## 295

The Court erred in not holding that at the time of filing of the bill of complaint herein, and ever since, and for a long time continuously next prior thereto, the Oregon and California Railroad Company had legal title and the possession of all lands of which forfeiture is sought by said bill of complaint.

## 296

The Court erred in holding that the United States, complainant herein, is the owner in fee simple or in possession of said lands or any part thereof or entitled to said lands or entitled to the possession of the same or any part thereof, which are sought to be purchased by these interveners and cross-complainants or any of them.

## 297

The Court erred in holding that, as a foundation for a suit to quiet its title to either of said grants, or any part thereof, the complainant was in possession of the said grants, or either of them, or any part thereof; and in holding that the Oregon and California Railroad Company did not have the possession of the same.

## 298

The Court erred in holding as a foundation for a

suit by complainant, to quiet its title to the said grants or either of them, or any part thereof, that the same had not been reduced to possession, and were unoccupied and vacant, and not in possession of said defendant, Oregon and California Railroad Company.

The Court erred in not holding that the United States, complainant herein, is not the owner in fee simple, nor in possession of said lands or any part thereof, nor entitled to said lands, nor entitled to the possession of the same or any part of the same, which are sought to be purchased by these interveners, and cross-complainants or any of them.

The Court erred in holding that the complainant is the owner in fee simple, or in possession of said lands or any part thereof, or entitled to the possession of the same or any part thereof.

The Court erred in holding that as a foundation for a suit to quiet its title to either of said grants, or any part thereof, the said complainant had legal title to the same, or either of them, or any part thereof; and in holding that the defendant, Oregon and California Railroad Company did not have the legal title to such grants.



The Court erred in holding that the title of the United States of America, of or in said lands or estates in lands sought to be purchased by these interveners and cross-complainants or any of them, be or is by said decree, quieted and confirmed, particularly as to any claim or claims of right, title and interest in, to or upon the same, in favor of these interveners and cross-complainants or any of them.

The Court erred in holding that the lands and estates in lands in the said decree described, and which were sought to be purchased by the interveners and cross-complainants herein or any of them, either in whole or in part, now are forfeited to, or that the title to or any part thereof, has reverted to and now is revested in the United States of America, or that the same or any part thereof, now are the absolute property of the United States of America, or are free from any and all claim or claims of right, title or interest or lien in, to or upon the same or any part thereof, by or in favor of these interveners and cross-complainants or any of them.

The Court erred in holding that the United States, complainant herein, was entitled to an injunction restraining the defendants or any of them, from conveying to these interveners and cross-complainants, any



of the lands sought to be purchased by them respectively, upon the terms proposed by said interveners and cross-complainants, and upon the terms provided in the act of July 25, 1866, and the act of April 10, 1869, amendatory thereof.

## 305

The Court erred in not holding that the United States, complainant herein, was not entitled to an injunction restraining the defendants or any of them, from conveying to these interveners and cross-complainants any of the lands sought to be purchased by them respectively, upon the terms proposed by said interveners and cross-complainants and upon the terms provided in the act of July 25, 1866, and the act of April 10, 1869, amendatory thereof.

## 306

The Court erred in holding that the United States, complainant herein, was entitled to an injunction restraining the defendants or any of them, from conveying to these interveners and cross-complainants, any of the lands sought to be purchased by them respectively, upon the terms proposed by said interveners and cross-complainants and upon the terms provided in the act of May 4, 1870.

## 307

The Court erred in not holding that the United States, complainant herein, was not entitled to an injunction restraining the defendants or any of them,

from conveying to these interveners and cross-complainants, any of the lands sought to be purchased by them respectively, upon the terms proposed by said interveners and cross-complainants, and upon the terms provided in the act of May 4, 1870.

## 308

The Court erred in holding that the United States, complainant herein, was entitled to any injunctive relief whatever as against these interveners and cross-complainants or any of them.

## 309

The Court erred in holding that the United States, complainant herein, was entitled to a decree restraining these interveners and cross-complainants, or any of them, from claiming or asserting any right, title, interest or lien in, to or upon the lands sought to be purchased by these interveners and cross-complainants, respectively.

## 310

The Court erred in not holding that the United States, complainant herein, was not entitled to a decree restraining these interveners and cross-complainants or any of them, from claiming or asserting any right, title or interest or lien in, to or upon the lands sought to be purchased by these interveners and cross-complainants, respectively.

## 311

The Court erred in holding that the title of complainant to the said lands, or any part thereof, should be quieted.

## 312

The Court erred in holding that the United States, complainant herein, was entitled to a decree quieting and confirming in it the title to the lands sought to be purchased by these interveners and cross-complainants, or any of them.

## 313

The Court erred in not holding that the United States, complainant herein, was not entitled to a decree quieting and confirming in it the title to the lands sought to be purchased by these interveners and cross-complainants, or any of them.

## 314

The Court erred in holding that the proviso in the amendatory act of April 10, 1869, was not a covenant, the acceptance and agreement to perform which was imposed by Congress as a condition precedent to the right of the Oregon and California Railroad Company to accept and become vested with the title to the lands under the grant of 1866.

## 315

The Court erred in holding that the word "provided"

introducing the proviso contained in the amendatory act of April 10, 1869, imported a condition subsequent, as

(a) The word “provided” is as appropriate for the purpose of importing a condition precedent as a condition subsequent, and

(b) Said proviso is coupled with a clause in said act contained permitting the grantees to except said grant one year after the pasage of said amendatory act, and

(c) Said proviso is not coupled with and does not bear any relation to the granting clause in said act amended.

## 316

The Court erred in not holding that the proviso in the amendatory act of April 10, 1869, was and is a covenant, the acceptance and agreement to perform which was imposed by Congress as a condition precedent to the right of the railroad company to accept and become vested with the title to the lands under the grant of 1866.

## 317

The Court erred in refusing to direct and decree a specific performance on behalf of the United States, the complainant herein, and against the defendant, Oregon and California Railroad Company and the other defendants claiming by, through and under it, requiring said defendants to convey to these interveners and



cross-complainants, the lands sought to be purchased by each respectively, upon payment of the purchase price therefor.

## 318

The Court erred in not holding that the defendant, Oregon and California Railroad Company and other defendants, claiming an interest in said land, be required to convey said land to the interveners and cross-complainants applying to purchase the same.

## 319

The Court erred in holding that the defendant, Oregon and California Railroad Company and each and all of the other defendants claiming an interest in said land, should not be required to convey said lands to the interveners and cross-complainants applying for the same.

## 320

The Court erred in holding that Congress did not intend by the act of April 10, 1869, to give to actual settlers the right to compel the railroad company to sell to them the lands embraced within the grant of July 25, 1866, according to the terms of the proviso in said act of April 10, 1869.

## 321

The Court erred in not holding that Congress intend by the act of April 10, 1869, to give to actual settlers the right to compel the railroad company to



sell to them the lands embraced within the grant of July 25, 1866, according to the terms of the proviso in said act of April 10, 1869.

The Court erred in holding that Congress did not intend by the act of May 4, 1870, to give to actual settlers the right to compel the railroad company to sell to them the lands embraced within the West Side land grant, according to the terms of the provision in said act of May 4, 1870.

The Court erred in not holding that Congress intended, by the act of May 4, 1870, to give to actual settlers the right to compel the railroad company to sell to them the lands embraced within the West Side land grant, according to the terms of the provision in said act of May 4, 1870.

The Court erred in refusing to direct and decree a specific performance on behalf of the interveners and cross-complainants and each of them, against the defendant, Oregon and California Railroad Company, and the other defendants claiming by, through and under it, requiring said defendants to convey to these interveners and cross-complainants, the lands sought to be purchased by said interveners and cross-complainants, respectively, as prayed for in their several bills.

The Court erred in holding that the provisions in each and both of said grants did not constitute contracts entered into by and between the Government and the railroad company, for the benefit of and enforceable by the interveners and cross-complainants.

The Court erred in holding that the proviso in the amendatory act of April 10, 1869, requiring sales to settlers, was not a covenant to a use and did not impress a trust upon said lands for the benefit of those, who in good faith should apply to make settlement upon said land, and to purchase the same in quantities and at prices provided by said amendatory act.

The Court erred in not holding that the proviso in the amendatory act of April 10, 1869, requiring sales to settlers, was a covenant to a use and impressed a trust upon said lands for the benefit of those, who in good faith should apply to make settlement upon said land and to purchase the same in quantities and at prices provided by said amendatory act.

The Court erred in holding that the provision in the act of May 4, 1870, relating to sale of land to actual settlers, was not a covenant to a use and did not impress a trust upon said lands for the benefit of those

who in good faith should apply to make settlement upon said land and to purchase the same in quantities and at prices provided by said act.

The Court erred in not holding that the provision in the act of May 4, 1870, relating to sale of lands to actual settlers, was a covenant to a use and impressed a trust upon said lands for the benefit of those who in good faith should apply to make settlement upon said land and to purchase the same in quantities and at prices provided in said act.

The Court erred in holding that the railroad company was not constituted a trustee for the benefit of the interveners and cross-complainants as *sestui que trustent*, under the provisions requiring sales of lands to settlers, referred to, in that

(a) "The nature and quality of their interests are not specific and definite," and in that

(b) "They are not susceptible of identification as such," and,

The Court erred in not holding that the railroad company, by the provisions in said grants contained, was constituted a trustee for the benefit of the interveners and cross-complainants as *sestui que trustent*, as

(a) The nature and quality of said interests under said grants are sufficiently specific and definite, and

(b) Their application to purchase and offer to settle upon the lands is a sufficient identification.

## 332

The Court erred in holding that the offer and tender by the interveners and cross-complainants, to purchase the lands sought by them to be purchased of and from the Oregon and California Railroad Company, did not give to the respective interveners and cross-complainants a vested interest in said lands, in default of an acceptance of such offers and conveyances of said lands by the Oregon and California Railroad Company.

## 333

The Court erred in not holding that the offer and tender by the interveners and cross-complainants, to purchase the lands sought by them to be purchased of and from the Oregon and California Railroad Company, gave to the respective interveners and cross-complainants, a vested interest in said lands, in default of an acceptance of such offers and conveyances, by the Oregon and California Railroad Company.

## 334

The Court erred in holding that the proviso in the act of April 10, 1869, is not sufficiently definite and certain to be enforced as a covenant to a use or as a trust.

## 335

The Court erred in not holding that the proviso in



the act of April 10, 1869, is sufficiently definite and certain to be enforced as a covenant to a use or as a trust.

## 336

The Court erred in holding that the proviso in the act of April 10, 1869, requiring sales to settlers, is sufficiently definite and certain as a condition subsequent, to entitle the Government to a forfeiture for its breach, and that it is not sufficiently definite and certain to be specifically enforced as a covenant to a use, or a covenant creating a trust.

## 337

The Court erred in not holding that the proviso in the act of April 10, 1869, for the sale of lands to actual settlers was intended by Congress as and was and is a covenant to a use only, and not a condition subsequent, as

(a) Said proviso contains specific and direct commands which were assented to, and performance thereof promised, by the Oregon and California Railroad Company, and

(b) Said proviso does not contain any clause providing for forfeiture or re-entry for breach of such covenant, and

(c) Said contract devotes said land to settlement and tillage and ultimate ownership by settlers.

## 338

The Court erred in holding that the proviso in the

act of April 10, 1869, was not a covenant to a use, impressed upon and running with the title to the land, until the title should have ultimately become vested in an actual settler, upon the terms and under the conditions provided in said grant.

The Court erred in not holding that the proviso in the act of April 10, 1869, was a covenant to a use, impressed upon and running with the title to the land, until the title should have ultimately become vested in an actual settler, upon the terms and under the conditions provided in said grant.

The Court erred in holding that the United States, complainant herein, had any right, title or interest in or to the land embraced within and covered by the East Side grant, or any part thereof, except as a settler of the trust in said lands.

The Court erred in holding that the provision in the act of May 4, 1870, is not sufficiently definite and certain to be enforced as covenant to a use or as a trust.

The Court erred in not holding that the provisions in the act of May 4, 1870, is sufficiently definite and certain to be enforced as covenant to a use or as a trust.

The Court erred in holding that the provisions in the act of May 4, 1870, requiring sales to settlers, is sufficiently definite and certain as a condition subsequent, to entitle the Government to a forfeiture for its breach, and that it is not sufficiently definite and certain to be specifically enforced as a covenant to a use, or as a covenant creating a trust.

The Court erred in not holding that the provision in the act of May 4, 1870, requiring sales to settlers, was intended by Congress as and was and is a covenant to a use only and not a condition subsequent, as

(a) Said provision contains specific and direct commands which were assented to and agreed to and performance thereof promised by the Railroad company, and

(b) Said provision does not contain any clause providing for forfeiture or re-entry for breach of such covenant, and

(c) Said contract devotes said land to settlement and tillage and ultimate ownership by settlers.

The Court erred in holding that the provisions in the act of May 4, 1870, was not a covenant to a use, impressed upon and running with the title to the land, until the title should have ultimately become vested in

an actual settler, upon the terms and under the conditions provided in said grant.

The Court erred in not holding that the provision in the act of May 4, 1870, was a covenant to a use, impressed upon and running with the title to the land, until the title should have ultimately become vested in an actual settler, upon the terms and under the conditions provided in said grant.

The Court erred in holding that the United States, complainant herein, had any right, title or interest in or to the land embraced within and covered by the West Side grant, or any part thereof, except as a settler of the trust in said lands.

The Court erred in holding that the United States, complainant herein, had any right, title or interest in and to the lands embraced within the East Side land grant or any part thereof, which it could enforce in this action, except such rights as it has as a settler of the trust in said lands, to enforce the provision of said trust, and such rights as it had and has to carry into effect in said suit, its public policies with relation to its granted lands, and

The Court erred in holding that the United States,



complainant herein, had any right, title or interest in and to the lands embraced within the West Side land grant or any part thereof, which it could enforce in this action, except such rights as it had or has as a settler of the trust in said lands to enforce the provisions of said trust, and such rights as it had and has to carry into effect in said suit, its public policies with relation to its granted lands, and

The Court erred in not holding that this suit can only be maintained by complainant as one to compel the specific performance of a trust covenant, or to enforce a public policy, as

(a) Neither of said land grants contains a provision importing a condition subsequent, upon the breach of which forfeiture could be had, and

(b) Congress has never declared a forfeiture of either of said land grants for breach of any condition subsequent, assuming that there is such condition in either of said land grants, and

(c) The fact of forfeiture has never been adjudicated by a court of law, and

(d) The defendant, Oregon and California Railroad Company holds the legal title to and possession of said lands, and

(e) Complainant having asked for forfeiture and in the alternative for specific performance, this suit cannot be maintained for forfeiture, since equitable relief may be granted by specific performance, and

(f) In view of specific performance a decree quieting title in the Government, cannot be had.

The Court erred in not holding, on the assumption that the said proviso in the act of April 10, 1869, is a condition subsequent, for breach of which forfeiture might be had, that complainant elected, by filing its suit in equity, to waive forfeiture, and elected to specifically enforce said proviso as a covenant to a use only.

The Court erred in not holding on the assumption that the said provision in the act of May 4, 1870, is a condition subsequent, for breach of which forfeiture might be had, that complainant elected, by filing its suit in equity, to waive forfeiture, and elected to specifically enforce said provision.

The Court erred in holding that the interveners and cross-complainants were not such actual settlers as were contemplated by the acts of April 10, 1869, and May 4, 1870.

The Court erred in holding that these interveners and cross-complainants did not have vested interests in the lands sought to be purchased by them and each

of them respectively, by reason of their various offers and tenders to purchase said lands upon the terms provided in the acts of April 10, 1869, and May 4, 1870.

The Court erred in holding that the evidence in this cause was sufficient to entitle complainant to the decree rendered herein.

The Court erred in not holding that the evidence in this cause was insufficient to support or sustain the decree rendered.

The Court erred in holding that the evidence adduced in support of the complaint of the United States, complainant herein, was sufficient to entitle complainant to a forfeiture of the title to the lands sought to be purchased by these interveners and cross-complainants or any of them.

The Court erred in not holding that the evidence adduced in support of the complaint of the United States, complainant herein, was not sufficient to entitle complainant to a forfeiture of the title of the lands sought to be purchased by these interveners and cross-complainants or any of them.

The Court erred in holding that the United States, complainant herein, was entitled to recover its costs and disbursements herein, or any costs or disbursements herein, against these interveners and cross-complainants, or any of them, and that a decree should be entered to that effect.

The petition and bill in intervention of B. W. Nunnally and others, which states the claims of all the interveners in this suit, is found in volume two of the printed transcript of record and covers pages 541 to 638, both inclusive. Special reference is made to this bill in intervention and the special attention of the Court is invited thereto.

## ARGUMENT

That the legislative intent governs is a principle so well settled that it would be superfluous to cite authorities. In the case at bar that intent is so clearly shown by the proviso contained in the amendatory act of April 10, 1869, that there cannot be two opinions as to what was intended. The language is plain: “And *provided further* that the lands granted by the act aforesaid shall be sold to actual settlers only, in quantities not greater than one-quarter section to one purchaser, and for a price not exceeding \$2.50 per acre.”

The land *shall be sold*. By whom? By that company which should qualify under the law to accept the grant.



When any company should qualify *under the law*; then, and not until then could the grant become effective; hence, as no company had qualified prior to the amendatory act of April 10, 1869, no right accrued to any company except under the proviso contained in that law. Clearly then, the acceptance of the grant with that stipulation that it should sell the land under that proviso imposed a trust upon the company so accepting, and, when acquired, the lands were held by such company *in trust*, for the use and benefit of such persons as should qualify as purchasers under the terms of the grant.

The defendant-appellant, O. & C. R. R. Co., built the railroad contemplated in the law, creating the grant in question. It has continuously maintained and operated the road; has carried the United States mails; has transported troops and munitions of war; has, in fact, done everything required of it with the one exception of selling the lands in accordance with the terms of the grant. It has sold lands in larger quantities than one-quarter section to one person and at a price in excess of \$2.50 per acre, but, in many instances, the Government has approved such sales, which fact is abundantly shown in the record of this cause. See transcript of record, Vol. 2, pages 1143 to 1147.

These sales and their approval by the Interior Department of the United States were made long prior to the commencement of this suit. Is not the complainant-appellee estopped from complaining of acts which it has so distinctly and repeatedly approved? Should

it be heard to demand a forfeiture of any part of the trust estate upon the ground of sales made in violation of the terms of the trust when it has openly and repeatedly approved such violations? We insist that the appellee is estopped by its own acts in this regard from demanding a forfeiture and that such demand should not be listened to by the Court. But, appellee asserts another ground for its demand, to-wit: That defendant-appellant, the O. & C. R. R. Co., has refused to sell the granted lands to those who have applied to purchase the same *under the terms of the grant*. This is true, but has the appellee been damaged by such refusal? If not why should it be heard to demand a forfeiture upon that ground? Who has any cause to complain of the refusal of the railroad company to sell the lands under the terms of the grant? Palpably those who have applied to purchase under the terms of the grant are the only ones aggrieved by the rejection of their applications; hence they are the only parties who are in position to demand redress. This they have done by coming into Court at the instance of the appellee, and asking the Court to enforce by its decree specific performance of the terms of the grant.

The appellee and the railroad company both insist, however that no *trust* was created in the granted lands, for the reason that no beneficiaries were named; that no class of persons was sufficiently designated so that beneficiaries could be identified. This question must not be determined upon the narrow lines of private trusts created by will, but upon lines of a broad public

policy. The purpose of the Congress was to have the lands acquired naturally by individuals in quantities not exceeding the acreage embraced as a maximum in other acts for acquiring the lands of the public domain—this to prevent a monopoly of the public lands in the hands of large holders. It was certainly not intended by the Congress to *create* a monopoly and prevent settlement of the public lands. The primary object in making such grants has at all times been to facilitate the settling up of the public lands. This purpose has been recognized by the Courts.

In support of the proposition that a trust is effective as such without the naming of beneficiaries the Court's attention is directed to 144 Pa. 428, where the Court held that where the language states in general terms the purpose of the grantor to have the grantee do some act for the benefit of a third party, it is sufficiently definite and will be enforced.

In *Perrin vs. Carey*, 65 U. S. 465 the Court held the following language sufficient to uphold the trust: "To the support of the poor white male and female orphans neither of whose parents are living."

In *Jones vs. Habershaw*, 107 U. S. 174-191, the following was held to be sufficiently definite:

"To one or more Presbyterians or Congregational Churches in the State of Georgia in such destitute and needy localities as the proper officers of said independent church may select, so as to promote the cause of religion among the poor and feeble churches of the State," etc.



In the case of *First National Bank of Elgin vs. Schween*, 127 Illinois 578, the Court held that "Beneficiaries in a deed of trust need not be designated by name. Hence a deed of trust to secure such farmers and dairy-men as should furnish the grantor with milk to be manufactured into butter and cheese is not void for want of designated beneficiaries."

The books are full of such decisions and a hundred of them might be cited, but the foregoing are sufficient to show the rule to be that "Where a conveyance of an estate is made to grantee, which requires him to dispose of the same in a particular way, or for the benefit of a particular class, a trust is thereby created."

In the case at bar the particular class to whom the lands were required to be sold were "actual settlers." A class easily ascertained, hence the trust intended to be established cannot fail for want of designated beneficiaries. By each selecting a particular portion of the granted land, applying to the railroad company to purchase the same, tendering the maximum price named in the law in payment for such selected lands and demanding a deed therefor, the interveners have established their identity as beneficiaries under the trust, and it is confidently expected that because of the error of the District Court of the United States for the District of Oregon in dismissing their bills of intervention, which error is particularly stated and clearly shown by their assignments of error as stated in the transcript of record, and herein, will be corrected by a decree of this Honorable



Court reversing the decree of said District Court and entering a decree establishing the interests of these interveners as they are asserted in their bills of intervention.                    Respectfully submitted,

A. C. WOODCOCK,  
LEWIS C. GARRIGUS,  
Attorneys for Intervenors.

Due service of the within and foregoing brief is hereby accepted.

.....,  
Attorney for Appellee.

.....,  
Attorneys for O. & C. R. R. Co.

